

# Notes

## Use of the Comparative Negligence Doctrine in Warranty Actions<sup>1</sup>

Manufacturers' liability for defective products has expanded greatly during the twentieth century. Professor Grant Gilmore suggested that this expansion stems from a fundamental change in philosophy from the nineteenth to the twentieth century:

As we look back on the nineteenth century theories, we are struck most of all, I think, by the narrow scope of social duty assumed. No man is his brother's keeper; the race is to the swift; let the devil take the hindmost. For good or ill, we have changed all that. We are now all cogs in a machine, each dependent on the other.<sup>2</sup>

The exchange of the philosophy that "no man is his brother's keeper" for the philosophy that "we are now all cogs in a machine, each dependent on the other" has led to an "explosion of liability"<sup>3</sup> in many areas of law. This change in the scope of social duty has certainly expanded manufacturers' liability for defective products.

In the nineteenth century, manufacturer liability for defective products was severely limited. In 1842, an English court in *Winterbottom v. Wright*<sup>4</sup> established the rule that manufacturers and suppliers of chattels could be liable for negligence only to those with whom they were in privity of contract.<sup>5</sup> Gradually, courts began to circumvent this privity requirement.<sup>6</sup> By the mid-twentieth century, the scope of social duty had broadened and suppliers were subsequently held liable to plaintiffs on

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1. This Note deals with state common law decisions regarding warranties. Statutes, however, are preempting the common law in more and more jurisdictions. This Note recognizes that Congress has been and probably will continue to review legislative proposals to enact a uniform federal products liability law. The bills introduced into Congress thus far have broad provisions dealing with comparative fault. For a recent update on Congressional action in this area, which is beyond the scope of this paper, see Atkeson & Neidlich, *A Status Report on Proposals for a Federal Products Liability Act*, 38 BUS. LAW. 623 (1983). See also *infra* note 202.

2. G. GILMORE, *THE DEATH OF CONTRACT* 95 (1974).

3. *Id.* at 94.

4. 152 Eng. Rep. 402 (Ex. 1842).

5. "Privity of contract" is a relationship between two or more contracting parties, and the term implies a connection, mutuality of will, and interaction of the parties. Its existence is essential to the maintenance of an action on any contract. *Wrenshall State Bank v. Shutt*, 202 Wis. 281, 283, 232 N.W. 530, 530 (1930).

Under the early doctrine of privity of contract, only the immediate seller was liable for damages caused by defects in goods by virtue of an express or an implied warranty. *Trans World Airlines v. Curtiss-Wright Corp.*, 1 Misc. 2d 477, 478-79, 148 N.Y.S.2d 284, 287 (1955), *aff'd*, 153 N.Y.S.2d 546 (1956). However, this requirement has been abrogated in the area of modern products liability. See U.C.C. § 2-318 (1978). See generally 8 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 998A (3d ed. 1968).

6. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 153-55 (1957) (the courts invented at least 29 different theories to circumvent the lack of privity between the plaintiff and the defendant). See also Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124 n.153 (1960).

The assault upon this "citadel of privity" began as early as 1916 in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (liability of manufacturer of inherently dangerous product based upon the relation arising from the purchase, together with the foreseeability of harm, not upon privity of contract), and culminated in the early 1960s with *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961) (no privity required for breach of implied warranty) and *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (no privity required for breach of express warranty).

a tort theory of strict liability.<sup>7</sup> The strict tort liability theory rejects the requirements of supplier negligence and privity of contract. Rather, liability under the strict tort liability theory arises when a manufacturer introduces an unreasonably dangerous and defective product into the market, and that product causes physical harm to the user or the user's property.

Thus, the pendulum had swung from *caveat emptor*<sup>8</sup> to *caveat venditor*.<sup>9</sup> In addition to holding the supplier strictly liable for defective products, many courts also ignored any buyer misconduct, thereby eliminating the availability of the contributory negligence defense.<sup>10</sup> The Pennsylvania Supreme Court, for example, held that the defense of contributory negligence in any form could not bar recovery in

7. "Strict liability" in tort law is liability without a showing of fault. The concept is an important aspect of the doctrine of products liability, and its chief elements are: (1) the defective and unreasonably dangerous condition of the defendant's product, and (2) a causal connection between such conditions and plaintiff's damages and injuries. *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1363 (Okla. 1974); *see also Hagenbuch v. Snap-on Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972) (applying New Hampshire law); *St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp.*, 12 Ill. App. 3d 165, 298 N.E.2d 289 (1973). The very term "strict liability" indicates that proof of negligence is unnecessary, and that traditional contract or warranty defenses such as lack of privity, lack of reliance on a warranty, lack of notice to the defendant of breach of warranty, and disclaimer of implied warranties are inapplicable. *See Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185, 35 Ohio Op. 2d 404 (1965); *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 223 A.2d 746 (1966).

The concept of "strict liability," as applied in the area of products liability, appears to have its genesis in W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 84 (2d ed. 1955), and in Dean Prosser's law review article *The Assault Upon the Citadel (Strict Liability to the Consumer)*, *supra* note 6. The concept received judicial support from Justice Traynor in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring), and it is expressed in detail in the leading case of *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The adoption of the concept by the Restatement (Second) of Torts in section 402A greatly abetted its acceptance in many jurisdictions. Section 402A provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

8. *Caveat emptor* expresses the rule of law that buyers buy at their own risk and must bear all losses arising from latent defects of a purchased product. *Hargous v. Stone*, 5 N.Y. 73, 82 (1851). This harsh principle has been modified judicially and legislatively to provide buyers with certain rights respecting the purchase of goods, e.g., warranties. *Ritchie v. Anchor Casualty Co.*, 135 Cal. App. 2d 245, 255-56, 286 P.2d 1000, 1006 (1955). *See generally Hamilton, The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

9. *Caveat venditor* expresses the rule of law that sellers sell at their own risk. *Hegarty v. Snow*, 1 Hawaii 198 (1854). To limit the amount of their potential liability, sellers must disclaim responsibility in an agreement with the buyer. *Wright v. Hart*, 18 Wend. 449, 453 (N.Y. 1837).

The idea that the pendulum was swung from *caveat emptor* to *caveat venditor* has been expressed in *Joyner v. Albert Merrill School*, 97 Misc. 2d 568, 574, 411 N.Y.S.2d 988, 992 (1978). *See generally Ausness, From Caveat Emptor to Strict Liability: A Review of Products Liability in Florida*, 24 FLA. L. REV. 410 (1972); *Dickerson, The ABC's of Product Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1969).

10. "Contributory negligence" is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which contributed as a legal cause with the defendant's negligence in bringing about the plaintiff's harm. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 65 (4th ed. 1971); *see also Pittsburgh, Cin., Chi. & St. L. Ry. v. Lynch*, 69 Ohio St. 123, 68 N.E. 703 (1903); RESTATEMENT (SECOND) OF TORTS § 463 (1965).

For cases holding that contributory negligence is not available as a defense to an implied warranty action, *see O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968); *Nichols v. Coppola Motors, Inc.*, 178 Conn. 335, 422 A.2d 260 (1979); *Henderson v. Cominco Am., Inc.*, 95 Idaho 690, 518 P.2d 873 (1974); *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); *Mattos, Inc. v. Hash*, 368 A.2d 993 (Md. 1977); *Imperial Die Casting Co. v. Coril Insulation Co.*, 264 S.C. 604, 216 S.E.2d 532 (1975); *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 143 S.E.2d 897 (1965).

a strict tort liability suit.<sup>11</sup> Furthermore, some courts have held that a plaintiff's contributory negligence, even after discovery of the defect, offered no defense to the manufacturer in a strict liability action.<sup>12</sup> Some courts, however, began to reassess supplier liability for defective products and began to consider whether buyers had any responsibility or duty to protect themselves from defective products, and whether buyers' contributory negligence should diminish their recoveries in products liability actions. The emerging trend which has developed from this reassessment indicates that courts now consider comparative negligence or comparative fault<sup>13</sup> in appropriate cases to reduce plaintiffs' recoveries in strict tort liability actions.<sup>14</sup>

Under the theory of implied warranty,<sup>15</sup> an alternative products liability action, courts have been more reluctant to use the comparative negligence doctrine to limit buyers' recoveries. This reluctance arose because the legal community has long characterized the warranty action as a contract action rather than a tort action. The conclusion followed that a negligence defense, which arises from tort law, had no place in a contract action.

This Note advocates the use of comparative negligence in warranty actions for several reasons. First the contract argument is less than conclusive because warranty originated in tort and to date retains many tort aspects. Second, the defense of contributory negligence is not a stranger to the warranty action. Some courts formally allow the defense of contributory negligence in warranty actions, while others expressly deny the use of this defense in warranty actions. This Note maintains, though, that whether courts formally deny or allow the contributory negligence

11. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). *But see* Farage & McDaid, *Annual Survey of Pennsylvania Legal Developments—Part I: Tort Law*, 47 PA. BAR ASSOC. Q. 419-22 (1976). Although none of the justices dissented from the Chief Justice's opinion in *Berkebile*, only one justice joined the Chief Justice—the five remaining justices concurred in the opinion without an in-depth analysis. Consequently a recent federal district court found that the "unreasonably dangerous" holding in the *Berkebile* decision expressed only the personal opinion of two members of the court and was not binding on the federal court. *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268 (E.D. Pa. 1975). The holding in *Berkebile* concerning comparative negligence may be subject to similar analysis.

12. *See, e.g.*, *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974). However, this court has since adopted the doctrine of comparative negligence to be applied to strict liability actions. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

13. "Comparative negligence" is the proportional sharing of compensation for harm between plaintiff and defendant based on the relative negligence of the two. The amount of damages to be recovered by the negligent plaintiff is reduced in proportion to his fault. *See generally* W. PROSSER, *supra* note 10, at § 67; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

The basic principle of the tort law of negligence is that there should be no liability without "fault," involving a large measure of moral and personal blame, *i.e.*, "some moral shortcoming." O. W. HOLMES, *THE COMMON LAW* 65 (Howe ed. 1963). However, the law has retreated from this position, and it is now generally recognized that the "fault" upon which liability may rest is social fault which may, but does not necessarily, include personal, moral shortcomings. W. PROSSER, *supra* note 10, at §§ 4, 75. Thus, "fault" is a broader term than "negligence," and when applied to "comparative fault" as opposed to "comparative negligence," it includes other types of conduct—most notably strict liability—than ones which are negligence-based. *See Turk, Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 203-07 (1950).

14. *See infra* notes 176-87 and accompanying text.

15. "Implied warranty" is a promise that a proposition is true, and exists when the law derives it by implication or inference from the nature of the transaction or the relative situation or circumstances of the parties. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612, (1958). While express warranties arise from the "dickered" terms of the particular bargain, *Denna v. Chrysler Corp.*, 1 Ohio App. 2d 582, 206 N.E.2d 221 (1964), implied warranties rest so clearly on a common factual situation or set of conditions that no particular language is necessary to evidence them, and they will arise unless clearly negated. *Michigan Pipe Co. v. Sullivan County Water Co.*, 190 Ind. 14, 21-22, 127 N.E. 768, 771 (1920). Implied warranties include warranties of merchantability and fitness for a particular purpose. *See U.C.C. § 2-313, comment 1* (1978).

defense, courts have often, in fact, compared the buyer's misconduct with the seller's defective product, and are therefore giving credence to the comparative negligence doctrine. Finally, the Note details the policy concerns that advocate the use of comparative negligence in the implied warranty action.

## I. THE HISTORY OF THE WARRANTY ACTION

For decades, commentators and judges have tried to determine whether the warranty action sounds in tort or in contract. Some authorities conclude that warranty sounds in contract,<sup>16</sup> while others maintain that warranty sounds in tort.<sup>17</sup> Still others suggest that breach of warranty should sound neither in tort nor in contract.<sup>18</sup> Dean Prosser's characterization of the warranty action as a "freak hybrid born of the illicit intercourse of tort and contract"<sup>19</sup> probably best captures the uncertain and elusive nature of the warranty action. Although commentators may not agree on the final characterization of this action, they do agree that the warranty action had its inception in tort law and retains tort characteristics to this day.

The first warranty actions antedated assumpsit<sup>20</sup> by more than a century.<sup>21</sup> These actions were actions on the case<sup>22</sup> and were included in the tort of deceit.<sup>23</sup> Paradoxically, although the early warranty action sounded in tort, it arose only if the warrantor *consented* to be bound by a warranty. In the leading English case of *Chandler v. Lopes*,<sup>24</sup> for example, the plaintiff alleged that a stone purchased from the defendant jeweler was misrepresented as a bezar-stone. The court denied recovery, predicating liability on the assertion of an express warranty:

16. See, e.g., *Holt v. Stihl, Inc.*, 449 F. Supp. 693, 694 (E.D. Tenn. 1977) (the court, interpreting Tennessee law, held that "[i]n Tennessee, an action for breach of warranty has been viewed generally as one sounding in contract, as opposed to tort law."); *Meester v. Roose*, 259 Iowa 357, 144 N.W.2d 274 (1966); *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 261 N.C. 660, 136 S.E.2d 56 (1964).

17. See, e.g., *Lee v. Wright Tool & Forge Co.*, 48 Ohio App. 2d 148, 152, 356 N.E.2d 303, 306 (1975) ("[i]n a products liability case in Ohio, a plaintiff may pursue a cause of action (1) in tort predicated upon negligence; (2) in contract where there is privity between plaintiff and defendant; and (3) in tort based upon the duty assumed by a manufacturer seller of a product, i.e., for breach of an implied warranty.") (emphasis added); see also *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975); *O'Brien v. Comstock Foods, Inc.*, 125 Vt. 158, 212 A.2d 69 (1965) (warranty held not necessarily required to be based on contract); Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 *RUTGERS L. REV.* 493, 500 (1962).

18. 11 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1393A (3d ed. 1968) ("[a]lthough originally, the action sounded in tort, many courts came to recognize breach of warranty as a contract action; [o]thers describe it as a form of 'strict liability' (but not absolute) and assimilate it to tort; [t]he majority appear to permit recovery on either theory; or, quite simply, without reference to either tort or contract, for breach of warranty.") (emphasis in original).

19. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099, 1121 (1960).

20. "Assumpsit," which eventually became the primary remedy for breach of contract, began its existence as a special form of "trespass on the case." Assumpsit means a "promise or engagement by which one person assumes or undertakes to do some act or pay something to another." *BLACK'S LAW DICTIONARY* 112 (5th ed. 1979). The breach of this promise or assumpsit was a wrong. For the history of the development of assumpsit as a form of action, see O. W. HOLMES, *THE COMMON LAW* 195-226 (Howe ed. 1963).

21. Ames, *The History of Assumpsit*, 2 *HARV. L. REV.* 1, 8 (1888).

22. "Trespass on the case," or simply "case," was a form of action at common law "adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another." *BLACK'S LAW DICTIONARY* 1347 (5th ed. 1979). The term is differentiated from the form of action called "trespass" in that "trespass" covered only direct injury. See W. PROSSER, *TORTS*, *supra* note 10, at § 7; Dix, *The Origins of the Action of Trespass on the Case*, 46 *YALE L.J.* 1142 (1937).

23. 1 T. STREET, *FOUNDATIONS OF LEGAL LIABILITY* 377-78 (1906); Ames, *The History of Assumpsit*, 2 *HARV. L. REV.* 1, 8 (1888). See W. PROSSER, *supra* note 10, at § 105 for the history and elements of the tort of deceit.

24. 79 Eng. Rep. 3 (Ex. 1603).

[T]he bare affirmation that it was bezar—stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezar—stone, it is not material; for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action . . . .<sup>25</sup>

Thus, the early warranty action required an assertion of an express warranty and was available only in the tort action of deceit.

The form of the warranty action remained in tort until the eighteenth century. Sometime after 1750, the legal community began to characterize an express warranty as a term of the contract of sale, and attorneys began to declare that express warranty actions sounded in contract.<sup>26</sup> Thus, in *Stuart v. Wilkins*,<sup>27</sup> when the disappointed buyer alleged that the defendant was liable in assumpsit for failing to deliver a sound mare as warranted,<sup>28</sup> the court was ready to recognize a contract action for breach of warranty. The *Stuart* court held that "[a]ssumpsit is a proper form of action, where there has been an express warranty."<sup>29</sup>

*Stuart* is sometimes cited as having transferred the law of warranty "almost bodily into the domain of contract."<sup>30</sup> Despite these assertions, the tort form of the warranty action retained some viability. In 1802, for example, the court in *Williamson v. Allison*,<sup>31</sup> upheld an action in tort for breach of a warranty of goods. Furthermore, recognition of the original tort form of the action has continued in some jurisdictions to the present day.<sup>32</sup>

Although the warranty action would retain much of its tort aspect, *Stuart* did transform warranty into an action primarily in contract. Consequently, by the time the implied warranty of quality<sup>33</sup> was first recognized,<sup>34</sup> "a whole generation of lawyers had been taught to regard any warranty as a contract, and the assumpsit action was accepted as a matter of course."<sup>35</sup>

The courts had become receptive to the idea of implied warranties, which arose by operation of law and not from the express terms of the contract, as early as 1778. In *Stuart*, the reporter editorially noted that "every seller makes with the purchaser a certain other implied contract, viz. that he knows of no latent defect or unsoundness"<sup>36</sup> of the product. One commentator finds no support for this assertion in

25. *Id.* at 4.

26. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 119 (1943).

27. 99 Eng. Rep. 15 (K.B. 1778).

28. *Id.*

29. *Id.*

30. 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 70 (1922); 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 390 (1906).

31. 102 Eng. Rep. 439 (K.B. 1802).

32. *Arnold v. White*, 153 Mich. 607, 117 N.W. 164 (1908); *Lee v. Wright Tool & Forge Co.*, 48 Ohio App. 2d 148, 356 N.E.2d 303 (1975); *Standard Paint Co. v. E.K. Victor & Co.*, 120 Va. 595, 91 S.E. 752 (1917).

33. "Warranty of quality" is a term that is used to refer to express and implied warranties as provided for in U.C.C. §§ 2-314, 2-315 (1978); the term refers to a statement or representation made by the seller of goods in connection with the contract of sale, and refers to the character or title of the goods. *Clearwater Forest Indus., Inc. v. United States*, 650 F.2d 233 (Ct. Cl. 1981); *Joseph v. Sears, Roebuck & Co.*, 224 S.C. 105, 77 S.E.2d 583 (1953).

34. *Gardiner v. Gray*, 171 Eng. Rep. 46 (K.B. 1815); *Holcombe v. Newson*, 170 Eng. Rep. 1194 (K.B. 1810).

35. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 120 (1943).

36. *Stuart v. Wilkins*, 99 Eng. Rep. 15, 16 (K.B. 1778).

the reported decisions,<sup>37</sup> but notes that in 1792, the court in *Mellish v. Motteux*<sup>38</sup> also seemed ready to recognize the implied warranty. The *Mellish* court held that the seller of a ship must disclose latent defects even if the buyer takes the ship "with all faults."<sup>39</sup> However, the *Mellish* holding was disapproved in a later case.<sup>40</sup>

In 1815, the English courts finally recognized the implied warranty of merchantability in *Gardiner v. Gray*.<sup>41</sup> In this case, the seller sold some "waste silk" by sample. Neither buyer nor seller had an opportunity to inspect the goods before delivery. When the goods arrived, the buyer claimed that the goods were of such an inferior quality that they could not be sold under the name "waste silk." Lord Ellenborough agreed with the buyer and articulated the principle of the implied warranty of merchantability:

I am of opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. . . . [T]he intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as *waste silk*?<sup>42</sup>

Lord Ellenborough's opinion emphasized that the seller had contracted to deliver one product and had, in effect, delivered another. He underscored the "intention of both parties" in interpreting the contract that they had made. Accordingly, breach of an implied warranty became breach of contract.<sup>43</sup> Recognition of the implied warranty of fitness for a particular purpose<sup>44</sup> soon followed.<sup>45</sup>

The earliest implied warranty cases, then, were treated primarily as contractual actions, with courts giving effect to the unexpressed intentions of the parties. In 1868, the court in *Jones v. Just*<sup>46</sup> stated that "in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under the description . . . ."<sup>47</sup>

37. Rasor, *The History of Warranties of Quality in the Sale of Goods: Contract or Tort?—A Case Study in Full Circles*, 21 WASHBURN L.J. 175, 190 (1982).

38. 170 Eng. Rep. 113 (K.B. 1792).

39. *Id.* at 113-14.

40. *Baglehole v. Walters*, 170 Eng. Rep. 1338 (K.B. 1811).

41. 171 Eng. Rep. 46 (K.B. 1815).

42. *Id.* at 47 (emphasis added).

43. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 121 (1943); Sedgwick, Conley & Sleight, *Products Liability: Implied Warranties*, 48 MARQ. L. REV. 139, 141 (1964).

44. The implied warranty of fitness for a particular purpose arises:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315 (1978); see also Sedgwick, Conley & Sleight, *Products Liability: Implied Warranties*, 48 MARQ. L. REV. 139, 145-48 (1964) (detailing the minor changes in this implied warranty from the Uniform Sales Act to the Uniform Commercial Code).

45. *Jones v. Bright*, 130 Eng. Rep. 1167, 1169 (C.P. 1829); *Beer v. Walker*, 46 L.J.Q.B. 667 (1877).

46. 37 L.J.Q.B. 89 (1868).

47. *Id.*

The Uniform Sales Act, patterned after the English Sale of Goods Act of 1894,<sup>48</sup> incorporated the substance of the *Jones* decision and emphasized the contractual nature of warranty.<sup>49</sup> The Act provided that: "Where the goods are bought by description from a seller who deals in goods of that description, whether he be the grower or the manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality."<sup>50</sup>

Although codification of warranty in the Uniform Sales Act emphasized the contractual nature of warranty, one scholar has noted that tort aspects of warranty have survived this codification:

[T]he affirmation of fact or the promise is a warranty only if its natural tendency is to induce the vendee to purchase the goods, and only if the vendee "purchases the goods relying thereon." The action on a warranty under the Uniform Sales Act still sounds very much like the action on the case for deceit.<sup>51</sup>

At the same time that the *Jones* court was emphasizing the contractual nature of the warranty action, courts began to recognize warranties that arose by implication of law. These warranties were independent of the intentions of the parties.<sup>52</sup> As a result, one author observed that to maintain that a warranty is a term of the contract is often "to speak the language of pure fiction."<sup>53</sup>

Eventually, the law of warranty was recodified in the Uniform Commercial Code.<sup>54</sup> Because the Code addresses issues of warranty, the notion that warranty is a contract action is strengthened. The warranty sections of the Uniform Commercial Code, sections 2-312 through 2-318, generally parallel the warranty provisions of the Uniform Sales Act.<sup>55</sup> Consequently, the Code links such contract concepts as privity,<sup>56</sup> notice,<sup>57</sup> and disclaimer<sup>58</sup> with warranty. The controversy concerning whether privity should be a necessary element in a warranty action best illustrates how Code warranties have become closely associated with contract law. Those opposing the abandonment of the privity requirement have argued that "the removal of privity would be inconsistent with the basically contractual nature of the Code, and warranty would then become a hybrid form of action without a firm basis in either tort

48. 56 & 57 Vict., ch. 71, § 14(2):

Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

49. UNIFORM SALES ACT § 15(2), 1 U.L.A. 213 (1950).

50. *Id.* Compare U.C.C. § 2-314 (1978).

51. Morrow, *Warranty of Quality: A Comparative Survey*, 14 TUL. L. REV. 327, 341 (1940) (emphasis in original).

52. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 121 (1943); Sedgwick, Conley & Sleight, *Products Liability: Implied Warranties*, 48 MARQ. L. REV. 139, 142 (1964).

53. Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 420 (1911).

54. The Uniform Commercial Code was first promulgated in 1952 and has undergone subsequent revisions.

55. Ausness, *From Caveat Emptor to Strict Liability: A Review of Products Liability in Florida*, 24 U. FLA. L. REV. 410, 430 (1970).

56. See U.C.C. § 2-318 (1978) which provides alternative privity requirements that the states may adopt.

57. U.C.C. § 2-607(3)(a) (1978); Comment, *Tort Action for Strict Liability Cases*, 26 WASH. & LEE L. REV. 143, 147 n.21 (1969) (the primary justification for the notice stipulation is that the seller should be informed that production and distribution of the defective product should be halted).

58. U.C.C. § 2-316 (1978) allows a seller to disclaim implied warranties when the language of the disclaimer specifically mentions merchantability.

or contract.”<sup>59</sup> Although courts have greatly relaxed the privity requirement in a warranty action,<sup>60</sup> the notion that the Code warranty has a “basically contractual nature” has survived.

On the other hand, the Code itself suggests that the characterization of warranty as a “basically contractual” action is not totally accurate. Section 2-314, comment 13, for example, underscores the continuing importance of tort concepts in warranty. This comment links the tortious concept of proximate cause with the Code warranty: “In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of warranty was the *proximate cause* of the loss sustained.”<sup>61</sup>

If the foregoing history of warranty does not indicate the exact nature of warranty, it does underscore two facts. First, the warranty action originated in the tort action of deceit. Second, the warranty action has retained tort characteristics throughout its long and convoluted evolution.

## II. CONTRIBUTORY NEGLIGENCE IN WARRANTY ACTIONS

### A. Implied Warranties as Strict Liability Causes of Action

To bring a successful action based on an implied warranty, the plaintiff must prove that a warranty existed, that the warranty was breached (the product was defective), and that the breach (defect) was the proximate cause of the alleged damage or injury.<sup>62</sup> The plaintiff can show that the warranty was breached by demonstrating that the product did not conform to the strictures of the implied warranty of merchantability or the implied warranty of fitness for a particular purpose as these strictures are defined in the Uniform Commercial Code.<sup>63</sup>

The implied warranty action has often been termed a strict liability cause of action; once the plaintiff shows three elements—warranty, breach, and proximate cause—then the defendant is held strictly liable. If the term strict liability means that the defendant becomes liable regardless of an absence of negligence on his part, then this label is correct. If, on the other hand, the term strict liability suggests that the defendant is liable regardless of the buyer's culpability then the strict liability label is, at best, misleading. At least one leading commentator maintains that the contributory negligence of the buyer should be considered in determining the seller's liability for an alleged defective product:

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59. Ausness, *From Caveat Emptor to Strict Liability: A Review of Products Liability in Florida*, 24 U. FLA. L. REV. 410, 430 (1972); see also Comment, *Tort Action for Strict Liability in Products Liability Cases*, 26 WASH. & LEE L. REV. 143, 149 n.31 (1969).

60. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1134 (1960).

61. U.C.C. § 2-314, comment 13 (1978) (emphasis added).

62. U.C.C. § 2-314, comment 13 (1978).

63. U.C.C. §§ 2-314, 2-315 (1978).



[L]iability for breach of warranty exists only where it is shown that the breach was the proximate cause of the harm for which recovery is sought, the question arises whether evidence which, in a negligence suit, might be introduced as showing the injured person's contributory negligence, may not be introduced in a breach of warranty action to show that the harm alleged to follow from a breach of warranty actually was otherwise caused.<sup>64</sup>

In fact, though, the authorities do not agree on whether contributory negligence is a proper defense to an implied warranty action.<sup>65</sup>

#### B. Contributory Negligence Allowed as a Defense in Implied Warranty Actions

Dean Prosser noted that "contributory negligence is conduct on the part of the plaintiff contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection."<sup>66</sup> Some courts recognize the defense of contributory negligence in breach of implied warranty actions.

The New Jersey Supreme Court ruled in *Cintrone v. Hertz Truck Leasing & Rental Service*<sup>67</sup> that the trial court had correctly placed the question of the plaintiff's contributory negligence before the jury.<sup>68</sup> In *Cintrone*, the question whether the lease agreement between the plaintiff and the defendant gave rise to a continuing implied warranty that the leased trucks would be fit for the plaintiff's use was decided affirmatively. The court stated that a buyer's or a lessee's contributory negligence would bar recovery. Thus, the question became whether the plaintiff continued to drive his truck after learning that the brakes were faulty.<sup>69</sup> After noting the conflict among the circuit courts on the propriety of the use of a contributory negligence defense in an implied warranty action, the court held that from the evidence presented,

[a jury] could have concluded the brakes were defective, that Cintrone knew it for some days before the accident but neglected to report the condition, and that with such knowledge he rode in the loaded truck for several hours until the brakes failed and caused the truck to collide with the overhead structure.<sup>70</sup>

In Maryland, courts have likewise sanctioned the defense of contributory negligence in breach of warranty suits.<sup>71</sup> In *Erdman v. Johnson Brothers Radio & Television Co.*,<sup>72</sup> the plaintiffs had purchased a television set from Johnson Brothers. The set needed constant repair. On December 7, 1966, the plaintiffs complained that

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64. R. HURSH & H. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 3:81 (2d ed. 1974).

65. 2 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 16.01[3] (1984); see Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 644-52 (1968); Miller, *Liability of a Manufacturer for Harm Done by a Product*, 3 SYRACUSE L. REV. 106, 121 (1951); Annot., 4 A.L.R. 3d 501-16 (1965 & Supp. 1983).

66. W. PROSSER, *supra* note 10, at § 65.

67. 45 N.J. 434, 212 A.2d 769 (1965).

68. *Id.* at 459, 212 A.2d at 783.

69. *Id.*

70. *Id.*

71. *Mattos, Inc. v. Hash*, 279 Md. 371, 368 A.2d 993 (1977); *Fredericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975).

72. 260 Md. 190, 271 A.2d 744 (1970).

they had seen sparks and smoke coming from the rear of the set. Although the television could not be serviced until December 10, the plaintiffs watched television on the evening of December 8. Still later that evening, the plaintiffs awoke to find that the television set had started a fire which eventually destroyed their home.<sup>73</sup>

The *Erdman* court acknowledged that jurisdictions throughout the United States were less than harmonious on the issue of the use of contributory negligence as a defense in a warranty action.<sup>74</sup> The court then noted that warranties arise under the Uniform Commercial Code which suggests a contractual basis for warranty actions, but that warranties have been termed "a curious hybrid, born of the illicit intercourse of tort and contract."<sup>75</sup> After discussing the dual nature of warranty, the court held that the purchaser's contributory negligence may bar recovery in a warranty action.<sup>76</sup> The court also held that "the breach of warranty, if there was one, was not the proximate cause of the fire because of the appellants' continued use of the set after the discovery of the obvious defects."<sup>77</sup> In effect, therefore, the court held that the contributory negligence of a purchaser may be a bar to recovery in a warranty action.<sup>78</sup>

In summary, the court, though troubled with the nature of warranty, nonetheless considered the buyer's conduct in determining the seller's liability. If one considers breach of warranty a tortious action, then the buyer's conduct will be considered under the label of contributory negligence. If, however, one stresses that warranty actions arise under contract law, then the buyer's conduct will be considered under the label of proximate cause.

The Minnesota courts have provided an interesting approach to the question of the use of the contributory negligence doctrine in implied warranty suits.<sup>79</sup> In *Nelson v. Anderson*,<sup>80</sup> the Minnesota Supreme Court noted that warranty originated from the action of deceit.<sup>81</sup> Furthermore, the court held that in a breach of implied warranty action, a showing of contributory negligence on the part of the buyer will bar the buyer's recovery of consequential damages.<sup>82</sup> The buyer's negligence, however, would not affect the right to recover general damages:

Where the plaintiff seeks to recover damages for a breach of a general warranty, which are usually the difference between the value of a thing as it is in fact and as it was warranted to

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73. Erdman had also complained in September 1966 that the television emitted sparks and smoke. At that time a repairman stated that whatever was wrong had "fused itself together" and that the set needed no servicing. *Erdman v. Johnson Bros. Radio & Television Co.*, 260 Md. 190, 192-93, 271 A.2d 744, 745 (1970).

74. *Id.*

75. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960).

76. "In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained." U.C.C. § 2-314, comment 13 (1978).

77. *Erdman v. Johnson Bros. Radio & Television Co.*, 260 Md. 190, 203, 271 A.2d 744, 750 (1970).

78. *Id.*

79. See *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374 (Minn. 1978); *Goblirsch v. Western Land Roller Co.*, 310 Minn. 471, 246 N.W.2d 687 (1976).

80. 245 Minn. 445, 72 N.W.2d 861 (1955).

81. *Id.* at 450, 72 N.W.2d at 865.

82. Consequential damages are injuries to person or property proximately resulting from a breach of contract. General damages equal the difference between the goods as warranted and the goods as accepted. See generally U.C.C. §§ 2-214, 2-715(2) (1978).

be, the question of negligence does not enter; but, where he seeks to recover consequential damages, he should not be permitted to recover for his own negligence. It has frequently been said that such damages are recoverable as may reasonably be said to have been within the contemplation of the parties. Warranty is not insurance, and there is nothing in this contract to indicate that either party supposed the defendant was to answer for the plaintiff's carelessness. If it is impossible to separate the consequences of the plaintiff's negligence from the defendant's breach of warranty, then the plaintiff must be limited to general damages, for otherwise he is permitted to recover for his own fault. We can discover no reason why he should be permitted to recover any damages which his own negligence has contributed to produce . . . .<sup>83</sup>

In 1982, the Minnesota courts again adhered to this formula. Accordingly, the Minnesota Supreme Court in *Peterson v. Bendix Home Systems, Inc.*<sup>84</sup> held that contributory negligence is a defense to a breach of warranty action at least for the recovery of consequential damages.<sup>85</sup> In regard to the plaintiff's claim for general damages, the value of her mobile home as warranted less the value of the home as accepted, the court ruled that contributory negligence was not an available defense.<sup>86</sup>

Although warranty has been deemed a strict liability cause of action in some jurisdictions, the preceding cases suggest that the courts will consider the buyer's conduct in appropriate cases. *Cintrone* illustrates that courts will sometimes entirely bar recovery on the basis of a plaintiff's contributory negligence.<sup>87</sup> In such cases, either the buyer's conduct presents an extremely compelling case for the application of contributory negligence, or the courts are not troubled by the dual nature of the warranty action.

In other cases, such as *Erdman*, the courts have perceived the contract/tort duality of warranty as a formidable obstacle to recognizing a contributory negligence defense. Yet even these courts, under the appropriate circumstances, have admitted their concern with the buyer's conduct. They may consider the buyer's contributory negligence or may rest their holdings on contributory negligence *and* proximate cause.<sup>88</sup>

The *Erdman* and *Cintrone* cases demonstrate that courts have been concerned with the buyer's conduct in the "strict liability" warranty action, and that they have, in fact, been limiting the defendant's liability either under the rubric of the contributory negligence doctrine or under some other concept such as proximate cause. Moreover, the *Nelson* and *Peterson* cases illustrate that while courts have often spoken the language of contributory negligence, they have in fact often been *comparing* the conduct of the buyer and the defendant.

Contributory negligence, of course, acts as a complete bar to the plaintiff's

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83. *Nelson v. Anderson*, 245 Minn. 445, 451, 72 N.W.2d 861, 865 (1955) (quoting *Razey v. J.B. Colt Co.*, 106 A.D. 103, 106, 94 N.Y.S. 59, 61 (1905)).

84. 318 N.W.2d 50 (Minn. 1982).

85. *Id.* at 53.

86. *Id.* at 54. Note also that Minnesota now has a comparative fault statute which was designed to include breach of warranty. MINN. STAT. ANN. § 604.01 subd. 1a (West Supp. 1983).

87. See also *Reid v. Spadone Mach. Co.*, 119 N.H. 457, 404 A.2d 1094 (1979).

88. See, e.g., *Erdman v. Johnson Bros. Radio & Television Co.*, 260 Md. 190, 271 A.2d 744 (1970).

recovery in a common law negligence action.<sup>89</sup> In *Nelson* and *Peterson* the courts explicitly spoke in terms of contributory negligence. However, these courts made it clear that the plaintiff's negligence or misconduct was not a complete bar to recovery in warranty actions. In fact, both of these courts stated precisely how far they were willing to extend the concept of contributory negligence in such actions. In *Peterson*, for example, the court applied the contributory negligence principle to consequential damages, but refused to make a similar application to nonconsequential damages.<sup>90</sup> As a result, the plaintiff purchaser, though found to be at least as much at fault as the defendant manufacturer, was allowed to recover the entire amount awarded as incidental and general damages (the difference between the product as warranted and the product as accepted).<sup>91</sup>

Therefore, some courts which have been limiting defendants' liability through concepts such as contributory negligence and proximate cause, have also been implicitly applying principles of comparative negligence in breach of warranty actions.<sup>92</sup>

### C. Contributory Negligence Expressly Denied as a Defense

Several jurisdictions formally bar the contributory negligence defense in breach of warranty actions. In *Chapman v. Brown*,<sup>93</sup> a young woman was severely burned when her hula skirt caught fire. The United States District Court for the District of Hawaii held that the woman's contributory negligence would not bar recovery under an implied warranty action.<sup>94</sup> The court, however, indicated its willingness to consider the buyer's conduct as less than a complete bar to the buyer's warranty action:

[T]he doctrine of contributory negligence, which takes no account of the comparative negligence of the parties, often produces results far from equitable, and for that reason is not likely to be adopted by the Hawaii courts in its full strictness . . . as a complete defense in cases . . . based on breach of implied warranty.<sup>95</sup>

The court, expressing a preference for the comparative negligence principle, held that a jury may not consider the plaintiff's contributory negligence to bar recovery in warranty suits, although the jury may consider the plaintiff's contributory negligence in fixing the amount of damages in such actions.<sup>96</sup>

Similarly, other courts have expressly denied the use of the contributory negligence defense while simultaneously allowing consideration of the buyer's conduct in determining damages. The United States District Court for the Eastern District of Tennessee, interpreting Tennessee law in *Holt v. Stihl, Inc.*,<sup>97</sup> held that a

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89. W. PROSSER, *supra* note 10, at § 65.

90. *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50, 54 (Minn. 1982).

91. *Id.* at 51.

92. See Annot., 4 A.L.R.3d 501, 502 (1965 & Supp. 1983).

93. 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

94. *Id.* at 95; see also *Nichols v. Coppola Motors, Inc.*, 178 Conn. 335, 422 A.2d 260 (1979); *Schenk v. Pelky*, 176 Conn. 245, 405 A.2d 665 (1978).

95. *Chapman v. Brown*, 198 F. Supp. 78, 85-86 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

96. *Id.* at 86.

97. 449 F. Supp. 693 (E.D. Tenn. 1977) (interpreting Tennessee law).

breach of an implied warranty is a contract action. Thus, the court reasoned that contributory negligence is not a proper defense to a warranty action.<sup>98</sup> The court buttressed this contention with the observation that no specific provision in Tennessee's statutory law of sales provides for the defense of contributory negligence in warranty cases.<sup>99</sup> Curiously, though, the *Holt* court added that contributory negligence which amounts to an assumption of the risk<sup>100</sup> should constitute a defense in a products liability action founded on breach of warranty.<sup>101</sup> This assertion demonstrates that even courts that deny that warranty has tort aspects will, under the proper circumstances, consider the buyer's conduct in determining a seller's liability.

The Georgia courts have also rejected the use of contributory negligence in warranty actions. In *Ford Motor Co. v. Lee*,<sup>102</sup> the plaintiff, Lee, brought a warranty action alleging personal injury. Lee had purchased a car from the defendant. On a cold March morning, Lee decided to let the car warm up before going to work. Lee started the car with one of her legs outside of the car. With the car in "park," Lee turned on the ignition and stepped on the accelerator. The car emitted a "loud roar," immediately jumped forward without warning, and continued rolling down the street until it collided with another car. As a result, Lee was injured.<sup>103</sup> On these facts, the court held that "[i]n an action predicated on breach of warranty, there is no defense per se of contributory negligence. . . ."<sup>104</sup> The court, however, was not insensitive to the defendant's argument that Lee had knowledge that the car had previously jumped out of gear.<sup>105</sup> The court noted that warranty actions present a jury question on whether the breach was a proximate cause of the injury.<sup>106</sup>

Later in 1976, in *McNeely v. Harrison*,<sup>107</sup> a Georgia appellate court was again

98. *Id.* at 694-95.

99. *Id.* at 694.

100. The doctrine of assumption of risk means that a plaintiff may not recover for an injury to which he assents. See BLACK'S LAW DICTIONARY 113 (5th ed. 1979). Assumption of risk may be express where the parties agree in advance that one will consent to assume the risk of the other's negligence. RESTATEMENT (SECOND) OF TORTS § 496B (1965). It may also be implied where the requisite consent may be inferred from the plaintiff's conduct. RESTATEMENT (SECOND) OF TORTS § 496C (1965). The elements necessary for a finding of assumption of risk are: (1) the conduct manifests consent; (2) the risk was encountered voluntarily; and (3) the plaintiff had full knowledge and appreciation of the danger. See W. PROSSER, *supra* note 10, at § 68.

Courts have considered the application of the doctrine of assumption of risk in strict tort liability cases. *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); *Barefield v. La Salle Coca-Cola Bottling Co.*, 370 Mich. 1, 120 N.W.2d 786 (1963); *Williams v. Ford Motor Co.*, 454 S.W.2d 611 (Mo. 1970) (recognized contributory fault as a defense being in the nature of assumption of risk). Other courts have gone further by recognizing assumption of risk as a defense in strict tort liability actions. *Kaneko v. Hilo Coast Processing*, 65 Hawaii 447, 654 P.2d 343 (1982); *Robinson v. Williamsen Idaho Equip. Co.*, 94 Idaho 819, 498 P.2d 1292 (1972); *Benjamin v. Deffet Rentals, Inc.*, 66 Ohio St. 2d 86, 419 N.E.2d 883 (1981); *Pegg v. General Motors Corp.*, 258 Pa. Super. 59, 391 A.2d 1074 (1978); *Young v. Coca-Cola Bottling Co.*, 109 R.I. 458, 287 A.2d 345 (1972); cf. *Lenherr v. NRM Corp.*, 504 F. Supp. 165 (D. Kan. 1980); *Stueve v. American Honda Motors Co., Inc.*, 457 F. Supp. 740 (D. Kan. 1980) (both cases applying comparative causation to strict liability actions involving a defective product).

101. *Holt v. Stahl, Inc.*, 449 F. Supp. 693,693 (E.D. Tenn. 1977).

102. 137 Ga. App. 486, 224 S.E.2d 168 (1976), *aff'd and rev'd in part*, 237 Ga. 554, 229 S.E.2d 379, *on remand* 140 Ga. App. 579, 231 S.E.2d 571 (1976).

103. *Id.* at 486, 224 S.E.2d at 170.

104. *Id.* at 487, 224 S.E.2d at 170.

105. *Id.* at 488, 224 S.E.2d at 171.

106. *Id.* at 488-89, 224 S.E.2d at 172.

107. 138 Ga. App. 310, 226 S.E.2d 112 (1976) (application for cert. denied by the Georgia Supreme Court).

called upon to decide the same issue. Faced with facts that suggested fault on the part of the plaintiff, the court made no mention of the contributory negligence defense. Instead, the court implicitly considered the buyer's conduct by examining the issue of whether the breach of warranty was the proximate cause of the injury.<sup>108</sup>

The above cases demonstrate that courts that expressly deny the use of the contributory negligence defense in warranty suits may still consider the buyer's conduct in determining the defendant's liability. One may argue that the *Chapman* court actually applied a comparative negligence standard since it allowed the jury, when fixing damages, to consider the plaintiff's negligence. As late as 1977, the *Holt* court stated that warranty sounds in contract which cannot accommodate the tort defense of contributory negligence.<sup>109</sup> The same court, however, also held that the defense of assumption of risk (also a product of tort law) may be available when buyer fault is more extreme.<sup>110</sup> Other courts would prefer to consider buyer misconduct through the doctrine of proximate causation rather than through the defense of contributory negligence.<sup>111</sup> Whether or not the courts formally adopt the defense of contributory negligence, most courts appear ready to consider the buyer's conduct in determining a seller's liability in warranty actions.

#### D. Ohio's Treatment of the Contributory Negligence Defense in Warranty Actions

The Ohio courts have also struggled with the dual nature of warranty. In 1966, the Ohio Supreme Court ruled that a products liability action could be maintained in tort based on either a theory of negligence or a theory of implied warranty.<sup>112</sup> After boldly asserting that a products liability action based on an implied warranty sounded in tort, one would expect that the Ohio courts would have little difficulty deciding whether to apply the tortious defense of contributory negligence in a warranty action. Ohio, however, has case authority that tends to support as well as deny the defense of contributory negligence in warranty actions.<sup>113</sup> The Ohio courts, however, have not squarely addressed this issue since early 1950.

In *Di Vello v. Gardner Machine Co.*,<sup>114</sup> an Ohio court suggested that the defense of contributory negligence was available in an implied warranty action. The *Di Vello* court held that in the absence of contributory negligence, the employee of a purchaser of a defective grinding wheel could recover damages from the seller of the product in a breach of implied warranty action.<sup>115</sup>

In *Wood v. General Electric Co.*,<sup>116</sup> on the other hand, the Ohio Supreme Court suggested that the defense was not available. The plaintiff in *Wood* brought a products liability action based on negligence and, alternatively, based on an implied

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108. *Id.* at 312, 226 S.E.2d at 114.

109. See *supra* notes 97-101 and accompanying text.

110. See *supra* notes 97-101 and accompanying text.

111. See *supra* notes 102-08 and accompanying text.

112. *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

113. See 4 A.L.R.3d 501, 504 n.19 (1965).

114. 102 N.E.2d 289, 46 Ohio Op. 161 (C.P. Cuyahoga Cy. 1951).

115. *Id.*

116. 159 Ohio St. 273, 112 N.E.2d 8 (1953).

warranty. The plaintiff appealed the trial court's decision and alleged error because the jury charge suggested that contributory negligence was a valid defense to an implied warranty action. The Ohio Supreme Court upheld the trial court decision and ruled that the trial court "did not in its general charge indicate that contributory negligence was a defense to the cause of action based on implied warranty . . . ."<sup>117</sup> Thus, although the Ohio Supreme Court did not actually declare that contributory negligence was not a defense to an implied warranty suit, the court did imply as much. The Ohio Supreme Court, then, has not ruled definitively on the question of contributory negligence as a defense to an implied warranty action.<sup>118</sup>

In 1978, however, an Ohio appellate court handed down an enigmatic decision on whether or not the buyer's conduct in applying herbicide to his crops could serve to mitigate damages in a warranty suit.<sup>119</sup> This court first noted that breach of warranty sounds in contract and then stated:

To the degree that damages are incurred solely by reason of the breach of warranty the negligence of plaintiff is not an effective defense [and,] [t]o the degree that the crop loss resulted from the negligence of plaintiff and not from the breach of warranty, plaintiff could not, of course, recover.<sup>120</sup>

Certainly, such language comports with comparative negligence principles, and once again a court expressly rejected the comparative negligence doctrine yet applied comparative negligence principles.

### III. THE COMPARATIVE NEGLIGENCE DOCTRINE<sup>121</sup>

The preceding cases reflect the tension that courts have faced in the past and continue to face today when determining the applicability of the contributory negligence principle to warranty actions. The courts were faced, on the one hand, with "an increasing dissatisfaction with the absolute defense of contributory negligence."<sup>122</sup> Consequently, they were hesitant to extend this concept to the semi-contractual, "strict liability" warranty cause of action. On the other hand, the courts continued to confront cases in which the buyer's conduct obviously played an important role in the resulting injury and thus, presented compelling facts to apply contributory negligence as a defense to warranty actions.

Courts, however, should be more receptive to using comparative negligence principles as a way of considering buyers' conduct in warranty actions. This is true,

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117. *Id.* at 278, 112 N.E.2d at 11.

118. *But see* *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 322, 364 N.E.2d 267, 271 (1977), in which the Ohio Supreme Court ruled that "there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort." Because the Ohio Supreme Court "originally adopted section 402A of the Restatement of Torts 2d *along with its attendant comments*," *Birchfield v. Int'l Harvester Co.*, 726 F.2d 1131, 1135 (6th Cir. 1984), comment n of the Restatement (Second) of Torts section 402A concerning contributory negligence may be adopted in implied warranty suits. *See infra* notes 140-41 and accompanying text.

119. *Slemmons v. Ciba-Geigy Corp.*, 57 Ohio App. 2d 43, 385 N.E.2d 298 (1978).

120. *Id.* at 52, 385 N.E.2d at 305.

121. Many states have adopted comparative negligence by statute. There are several variants of statutory comparative negligence, including modified and pure comparative negligence. This Note does not purport to analyze the advantages and disadvantages of the different types of comparative negligence.

122. W. PROSSER, *supra* note 10, at § 70.

first, because warranty sprang from the law of torts and to this day retains tort characteristics, and second, because some courts do recognize the tort law defense of contributory negligence in warranty actions.

In a situation far removed from the question of whether comparative negligence should be applied to a warranty action, Gertrude Stein once wrote that "[a] rose is a rose is a rose."<sup>123</sup> These words, however, aptly fit the topic under examination; for whether or not the courts have used the term "comparative negligence" in warranty cases, they have in fact applied this doctrine. Perhaps *Chapman v. Brown*<sup>124</sup> and *Peterson v. Bendix Home Systems, Inc.*<sup>125</sup> present the two best examples of courts implicitly using comparative negligence principles. In *Chapman*, the court refused to instruct the jury on the defense of contributory negligence but did allow the jury to consider the plaintiff's negligence in determining damages.<sup>126</sup> The *Peterson* court also used a comparative negligence approach to bar consequential damages, but the court would not use the comparative negligence doctrine to bar nonconsequential damages in a warranty action.<sup>127</sup>

Other cases also demonstrate that courts have reduced damages in warranty actions when there was evidence of buyer fault. Therefore, although some courts have expressly rejected the contributory negligence defense to warranty actions, they have sometimes held that a seller's breach of warranty was not the proximate cause of the buyer's injury.<sup>128</sup> Thus, the common law decisions provide much support for the adoption of comparative negligence in warranty actions.

Some jurisdictions regard warranty as entirely a creature of contract law and, thus, are not willing to consider the tort defense of contributory negligence in warranty actions.<sup>129</sup> Article 2 of the Uniform Commercial Code, however, suggests that the buyer's conduct should be considered in warranty actions. The comments to the Code urge consideration of contributory negligence and assumption of the risk in assessing the defendant's liability in warranty actions. One comment suggests that "if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty."<sup>130</sup> Although this comment deals with failure to inspect the goods before sale, a second comment relates to consequential damages:

Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was

123. Stein, *Sacred Emily*, in *GEOGRAPHY AND PLAYS* 187 (1922).

124. 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

125. 318 N.W.2d 50 (Minn. 1982).

126. See *supra* notes 93-96 and accompanying text.

127. See *supra* notes 84-86 and accompanying text.

128. Compare *Erdman v. Johnson Bros. Radio & Television Co.*, 260 Md. 190, 271 A.2d 744 (1970) (court held that contributory negligence is a defense to a breach of warranty while also ruling that defendant had not proximately caused the harm) with *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168 (1976), *aff'd and rev'd in part*, 237 Ga. 554, 229 S.E.2d 379, *on remand*, 140 Ga. App. 579, 231 S.E.2d 571 (1976) (court ruled that contributory negligence is not a defense to a warranty action and instead ruled on whether or not the defendant had proximately caused the harm).

129. See, e.g., *Holt v. Stihl, Inc.*, 449 F. Supp. 693, 694 (E.D. Tenn. 1977) (In Tennessee, warranty sounds in contract, and "the Uniform Commercial Code, as adopted in Tennessee, includes no specific provisions as to whether contributory negligence [or comparative negligence] is a defense. . .").

130. U.C.C. § 2-316(3)(b), comment 8 (1978).



reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.<sup>131</sup>

This comment is not confined solely to an analysis of the buyer's conduct before the contract, but also includes buyer's conduct after the purchase of the goods.<sup>132</sup>

#### A. Policies Underlying Comparative Negligence

The rationale underlying comparative negligence is that a plaintiff who has contributed to his or her own injury should not be fully compensated by the defendant even though the defendant has helped to bring about the harm. Fairness and equity mandate that the plaintiff receive a damage award reduced in proportion to his or her own fault.<sup>133</sup> The articulation of this principle, however, was long in coming.

At common law, courts rarely attempted to apportion damages between the parties. Instead, courts favored such all-or-nothing approaches as contributory negligence or assumption of the risk:

The trouble with contributory negligence, assumption of risk, and other common law approaches to the problem of plaintiff's fault is that they go on the premise that everything is black and white—the plaintiff gets everything or he doesn't get anything; there is no in between. These approaches are derived from old common law pleading. The common law never compromised anything, because compromise was to be used in equity, which was not regarded as real law . . . . Common law pleading was based on the idea that everything should be reduced to an issue that could be answered yes or no. The answer could not be maybe, or yes if; it had to be yes or no, and law courts did not deign to look at the possibility of something in between. That attitude, especially as displayed in the common law doctrine of contributory negligence, produces rank injustice.<sup>134</sup>

Although during the nineteenth century courts and commentators recognized this injustice, they expounded several rationales for retaining the contributory negligence rule. First, authorities argued that injustice under the contributory negligence system was the exception. Thus, if one were to consider all the cases together, the system would not reveal "rank injustice."<sup>135</sup> Second, commentators emphasized that the contributory negligence rule gave plaintiffs an incentive to use reasonable care for their own safety.<sup>136</sup> Finally, some authorities theorized that the rule of contributory negligence was developed to protect the growth of essential industries during the nineteenth century.<sup>137</sup>

Because the twentieth century mind found such justifications inadequate, and because the contributory negligence rule resulted in all-or-nothing awards, courts

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131. U.C.C. § 2-715, comment 5 (1978).

132. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 112 (1972).

133. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 2.1 (1974).

134. Wade, *A Conspectus of Manufacturer's Liability for Products*, 10 IND. L. REV. 755, 760-61 (1977).

135. *Id.* at 761.

136. W. PROSSER, *supra* note 10, at § 67. Prosser adds, however, that it is not an "answer to say that the contributory negligence rule promotes caution by making the plaintiff responsible for his own safety. It is quite as reasonable to say that it encourages negligence, by giving the defendant reason to hope that he will escape the consequences. Actually any such idea of deterrence is quite unrealistic." *Id.*

137. Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 658 (1979); Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945).

began to decry the contributory negligence defense in negligence suits. Likewise, the courts were not anxious to extend this harsh all-or-nothing doctrine to the newly-developing field of strict products liability.<sup>138</sup> Thus, the strict products liability section of the Restatement (Second) of Torts<sup>139</sup> circumscribed the contributory negligence doctrine.<sup>140</sup> One authority notes that the real reason for the rejection of the contributory negligence rule in the Restatement strict liability provision was that during its development most jurisdictions still used contributory negligence as a complete bar to the plaintiff's action.<sup>141</sup>

Although the drafters of the Restatement hoped that strict liability in tort would replace the warranty action in products liability cases, in many jurisdictions plaintiffs may still bring their products liability suits in negligence, strict tort liability, or warranty. Both the section 402A action and the warranty action have been characterized as strict liability actions. Consequently, the courts have been reluctant to use contributory and comparative negligence principles to reduce damages in these actions. The strict tort liability action has met resistance, similar to that experienced by warranty actions, to the use of comparative negligence principles. In 1975, for example, the Pennsylvania Supreme Court ruled that no form of contributory negligence would bar recovery in a strict tort liability suit.<sup>142</sup> Another court ruled that contributory negligence, even after discovery of the defect, was not a defense to a strict liability tort action.<sup>143</sup> Notwithstanding some initial aversion to the use of the comparative negligence doctrine in strict liability actions, however, several jurisdictions have begun to use this concept in such actions.<sup>144</sup> The trend toward replacing contributory negligence with comparative negligence principles has diminished the distaste for considering a buyer's conduct in strict liability tort actions.<sup>145</sup>

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138. Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729, 736 (1980).

139. See *supra* note 7 for a statement of § 402A of the Restatement (Second) of Torts.

140. The Restatement deals with contributory negligence as follows:

Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965).

141. Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729, 736 (1980).

142. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975).

143. *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974).

144. For examples of cases using comparative negligence principles in strict liability actions, see Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729, 737 n.29 (1980).

145. Fischer, *Products Liability—Applicability of Comparative Negligence to Misuse and Assumption of the Risk*, 43 Mo. L. Rev. 643, 643 n.1 (1978).

B. *Economic Considerations Underlying the Use of the Comparative Negligence Doctrine*<sup>146</sup>

Ronald H. Coase was the first to apply economic principles to the study of tort law.<sup>147</sup> Since this initial endeavor, many other commentators have sought to illustrate the relationship between economic principles and tort law.<sup>148</sup> Not surprisingly, the theory of strict liability has also been the subject of economic analysis.<sup>149</sup>

Perhaps the first economic commentary on strict tort liability comes from the decisions of Justice Traynor who pioneered the common law strict tort liability theory. In *Escola v. Coca-Cola Bottling Co.*,<sup>150</sup> Justice Traynor reasoned:

Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business . . . . However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.<sup>151</sup>

In this passage, Traynor suggests that tort law should be structured to place the cost of defective products on the cheapest cost-avoider. Traynor thus endorses the strict tort liability theory in products liability actions since the manufacturer is the cheapest cost-avoider. Professor Guido Calabresi agrees with this analysis of strict liability.<sup>152</sup> Calabresi, relying on Ronald Coase's seminal article *The Problem of Social Cost*,<sup>153</sup> finds that liability should rest on the "cheapest cost-avoider" and concludes that the cheapest cost-avoider is the manufacturer.<sup>154</sup>

Of course, some well-known economic theorists disagree with the analysis of Traynor and Calabresi. Former professor and current Circuit Judge Richard Posner, for example, uses economic analysis to support the traditional negligence theory.<sup>155</sup> Posner maintains that the negligence theory, especially as determined by the Learned

146. The economic analysis in this section is not meant to be exhaustive. This section does, however, introduce the economic analysis of two eminent legal scholars.

147. See Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960) (expounding on the English law of nuisance).

148. See generally G. CALABRESI, *THE COST OF ACCIDENTS* (1970) (use of economic theory to explore the utility of the negligence theory); Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64 (1970); Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. LAW & ECON. 201 (1971) (use of economic theory to explain the law of intentional torts).

149. See generally G. CALABRESI, *THE COST OF ACCIDENTS* (1970); Buchanan, *In Defense of Caveat Emptor*, 38 U. CHI. L. REV. 64 (1970).

150. 24 Cal. 2d 453, 150 P.2d 436 (1944).

151. *Id.* at 462, 150 P.2d at 440-41 (Traynor, J., concurring); Traynor makes this argument again in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 909, 27 Cal. Rptr. 697, 700 (1963).

152. See generally G. CALABRESI, *THE COST OF ACCIDENTS* (1970).

153. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

154. See Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 649-59 (1971).

155. See generally Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

Hand formula,<sup>156</sup> promotes the "cost . . . efficient—the cost justified—level of accidents and safety."<sup>157</sup>

Although Calabresi and Posner disagree on whether economic theory justifies the strict liability theory, they both question the economic utility of comparative negligence in tort law and consequently in actions founded on strict tort liability or warranty theories. Calabresi notes that comparative negligence is the logical conclusion of the fault system. He finds, though, that comparative negligence will not effectively promote risk spreading.<sup>158</sup> Although comparative negligence will lead to a more even distribution of damages between the plaintiff and the defendant, Calabresi maintains that comparative negligence will not be cost efficient unless it is administered so as to put the loss on the cheapest cost-avoider.<sup>159</sup> Calabresi concludes that while comparative negligence is logical in a fault system, it would satisfy his economic system of loss spreading

only if it were applied in a way that would place the bulk of liability on the best loss spreader rather than on the party most at fault. Therefore [comparative negligence] can save the fault system only if [people] are willing to accept greater modifications in the system than the adoption of comparative negligence would seem to imply.<sup>160</sup>

Posner, who advocates retention of the fault or negligence theory, also discounts the comparative negligence doctrine. Posner maintains that the comparative negligence standard "is not the correct economic standard . . . because . . . it would result in parties' spending more than the efficient amount on accident prevention."<sup>161</sup> Posner illustrates this statement through the hypothetical case of a plaintiff who can prevent a \$1000 accident at a cost of \$100 and a defendant who can prevent this loss for \$50. If the defendant were fully liable for the accident, he or she will have incentive to pay \$50 to prevent the accident. In this case, the cost of accident prevention equals \$50. If, however, comparative negligence is used and the defendant is held liable for two-thirds of the accident cost and the plaintiff is held liable for one-third of the accident cost, the comparative negligence system will lead to an inefficient result. Because the defendant is liable for \$666.67, he or she will have incentive to spend \$50 on accident prevention. The plaintiff, being held liable for \$333.33, will have incentive to spend the \$100 to prevent the accident. Consequently, the parties together may invest \$150 to prevent the accident. This amounts to a \$100 increase in the cost of preventing the accident from the situation in which the defendant is found to be totally liable.<sup>162</sup>

At least two economic models, then, reject the comparative negligence doctrine.

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156. Judge Learned Hand developed his formula in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (in a negligence case, three variables are important in determining a defendant's standard of care: the magnitude of the loss, the probability of the accident's occurrence, and the cost of taking precautions to avert the accident; if the product of the first two variables is greater than the cost of taking precautions, then the defendant is negligent).

157. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972).

158. G. CALABRESI, *THE COST OF ACCIDENTS* 279 (1970).

159. *Id.*

160. *Id.* at 281.

161. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 70 (1973).

162. *Id.* at 70-71 (the hypothetical situation is adopted from the hypothetical that Professor Posner sets out on pages 71 and 72).

Some advocates of the comparative negligence doctrine, however, argue that in practice the comparative negligence system would function to put the loss on the best risk avoider<sup>163</sup> since most cases would be tried by a jury that inevitably would be sensitive to apportioning damages to the best risk avoider.<sup>164</sup> Thus, proponents of the comparative negligence doctrine can advance economic arguments to support their positions.

In *Lewis v. Timco, Inc.*,<sup>165</sup> one federal circuit court recently grounded its decision to use the comparative negligence doctrine<sup>166</sup> to reduce liability in an unseaworthiness<sup>167</sup> action (a strict liability cause of action) on both fairness and economic factors. Like Calabresi and Posner, this court also framed the economic issue by asking which party could prevent the injury with the least costs.

The court stated that manufacturers will alter their products to avoid accidents if the manufacturer's portion of the expected accident cost is greater than the cost of altering the product.<sup>168</sup> The court stated further that a policy of strict liability tempered by comparative negligence requires that the manufacturers' accident costs include *only* those costs caused by the product defect. Thus, "the manufacturer will have the correct economic incentive to adjust the design of the product to minimize accident costs caused by the design."<sup>169</sup> A policy of strict liability without comparative negligence, on the other hand, would force a manufacturer to spend an inefficient amount of money to prevent accidents: in a system without comparative negligence, the manufacturers' accident costs include negligent use by the buyer as well as product defect.

A system that combines strict liability and comparative negligence will also lead the buyer to expend an efficient amount of money to prevent accidents.<sup>170</sup> The buyer "will intentionally alter his use of the product only if his perceived cost of altering his use to avoid an accident is less than his expected cost from an accident resulting from

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163. See 2 HARPER & JAMES, *THE LAW OF TORTS* 1203, 1207 (1956); Gregory, *Rejoinder*, 54 HARV. L. REV. 1184 (1941); James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); James, *Replication*, 54 HARV. L. REV. 1178 (1941).

164. G. CALABRESI, *THE COST OF ACCIDENTS* 279-80 (1970).

165. 716 F.2d 1425 (5th Cir. 1983) (en banc).

166. Although the *Timco* court uses the phrase "comparative fault" in its economic analysis, this Note will continue to use the phrase "comparative negligence" in this section in order to maintain internal consistency.

167. Under the maritime doctrine of "unseaworthiness," seamen were permitted to recover from shipowners for injuries caused by defects rendering a vessel "unseaworthy," "unable to withstand the perils of an ordinary voyage at sea." See, e.g., *The Osceola*, 189 U.S. 158, 175 (1903). Although "unseaworthiness" imposes strict liability on the defendant, comparative principles are applied, and the degree to which the plaintiff contributes to his own injuries has been considered when determining the amount of damages. See, e.g., *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1953); see also 1B E. JHIRAD, A. SANN & B. CHASE, *BENEDICT ON ADMIRALTY* § 25 (7th ed. 1983) (when an action is brought for unseaworthiness, the comparative negligence doctrine applies).

Comparative negligence principles have become so widely applied by admiralty courts in other areas of nonfault liability for personal injuries that the "admiralty rule in personal injury cases is, in effect, one of comparative negligence." G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 500 n.70 (2d ed. 1975); see also *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1427-28 (5th Cir. 1983) (en banc) (comparative negligence principles applied to actions under the Jones Act, 46 U.S.C. § 688 (1976), the Death on the High Seas Act, 46 U.S.C. § 766 (1976), and in Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 *et seq.* (1976)). See generally Owen & Moore, *Comparative Negligence in Maritime Personal Injury Cases*, 43 LA. L. REV. 942 (1983); Owen & Moore, *Comparative Negligence in a Maritime Products Liability Case: Lewis v. Timco, Inc.*, 43 LA. L. REV. 1543 (1983).

168. *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1432 (5th Cir. 1983) (en banc).

169. *Id.*

170. *Id.*

his failure to alter his behavior."<sup>171</sup> While a simple strict liability system gives the buyer no incentive to avoid an accident that he could avoid more cheaply than the defendant, the comparative negligence doctrine encourages the buyer to expend a more efficient amount to prevent accidents due to his own negligence.

The *Timco* court concluded its economic argument in favor of the comparative negligence system by stressing two points. First, the comparative negligence standard decreases the risk that nonnegligent buyers will have to subsidize negligent buyers through increased product prices. Second, the comparative negligence paradigm yields a product price that reflects the cost of the nonnegligent use.

Thus, although the *Timco* court believed that the decision to use the comparative negligence doctrine ultimately turns on notions of fairness and equity, this federal circuit court concluded that economic concepts also support the doctrine of comparative negligence.

One commentator decries a strict economic analysis in tort law, intoning that "the thrust of the academic literature is to convert the tort system into something other than a mechanism for determining the just distribution of accident losses . . . . Discussed less and less are precisely those questions that make tort law a unique repository of intuitions of corrective justice."<sup>172</sup> In addition to developing economic justifications for the comparative negligence doctrine, then, one must realize that economic models can actually account for only quantifiable variables. Economic models, by their nature, cannot account for principles of equity, fairness, and public policy on which comparative negligence is founded.

Courts and commentators should respond to the economic arguments against the use of comparative negligence with the principle that "[r]ather than resolutely maintaining doctrinaire positions, the attainment of a 'just and equitable result' must ultimately prevail if the system is to regain balance and retain societal approval."<sup>173</sup> Once again the California Supreme Court clearly states this philosophy: "If a *more just result* follows from the expansion of comparative principles, we have no hesitancy in seeking it, mindful always that the fundamental and underlying purpose of *Li*<sup>174</sup> was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault."<sup>175</sup>

### C. Comparative Negligence in Strict Tort Liability Actions

The reassessment of the role of comparative negligence in products liability actions began with the strict liability tort action. After observing the inequity of imposing undiminished liability on a seller, jurisdictions began to explore the

171. *Id.*

172. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537-38 (1972).

173. Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729, 761 (1980); see also A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 123-26 (1983) (discussing the valuation problem in economic analysis of law).

174. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (California was one of the few states that adopted the comparative negligence rule judicially, finding the contributory negligence rule inequitable because it failed to allocate responsibility in proportion to fault and because it was contrary to all notions of fairness which require the extent of fault to govern the extent of liability.)

175. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 737, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978) (emphasis added).

comparative negligence doctrine as a means to increase fairness and equity in products liability actions. At the same time, courts wanted to further the social goals fostered by strict liability; strict liability forces a seller to spread the losses of a few individuals among all consumers and gives a seller incentive to manufacture safe products.<sup>176</sup> More and more courts conclude that comparative negligence increases equity and fairness in the products liability action by allowing consideration of the buyer's conduct while furthering the objectives of the strict liability action.<sup>177</sup>

Because the section 402A products liability action was a strict liability action and not a negligence action, courts initially refused to apply the comparative negligence doctrine. These courts argued that to apply comparative negligence to a strict liability action would be an impermissible intermingling of "apples and oranges."<sup>178</sup> Eventually, though, "[r]ather than resolutely maintaining doctrinaire positions, the more flexible and sensitive jurisdictions have determined that the attainment of a 'just and equitable result' must ultimately prevail if the system is to regain balance and retain societal approval."<sup>179</sup>

The first court to apply comparative negligence principles to a strict liability tort action ingeniously circumvented the "apples and oranges" argument. In *Dippel v. Sciano*,<sup>180</sup> the Wisconsin Supreme Court reasoned that the strict liability tort action was equivalent to a negligence per se action. The *Dippel* court observed that section 402A does not impose absolute liability on a seller. The court then applied its comparative negligence statute to the strict liability action, stating:

Strict liability in tort for the sale of a defective product unreasonably dangerous to an intended user or consumer now arises in this state by virtue of a decision of this court. If this same liability were imposed for violation of a statute it is difficult to perceive why we would not consider it negligence per se for the purpose of applying the comparative negligence statute just as we have done so many times in other cases involving the so-called "safety statutes."<sup>181</sup>

After *Dippel*, other courts began to apply their comparative negligence statutes to strict tort liability suits.<sup>182</sup>

In 1978, the California Supreme Court, without the aid of a comparative negligence statute, sanctioned the use of comparative negligence in strict tort liability actions. In *Daly v. General Motors Corp.*,<sup>183</sup> the California high court competently

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176. Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 Mo. L. REV. 431, 432 (1978).

177. For examples of cases which use comparative negligence principles in products liability actions, see Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729, 737 n.29 (1980). But see Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 797-98 (1977).

178. See *infra* notes 183-84 and accompanying text.

179. Sales, *Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729, 761 (1980).

180. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

181. *Id.* at 462, 155 N.W.2d at 64-65.

182. See *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Ontai v. Straub Clinic and Hosp. Inc.*, 659 P.2d 734 (Hawaii 1983); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980); *Busch v. Busch Constr. Inc.*, 262 N.W.2d 377 (Minn. 1977); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Baccelleri v. Hyster Co.*, 287 Or. 3, 597 P.2d 351 (1979); *Schuh v. Fox River Tractor Co.*, 63 Wis. 2d 728, 218 N.W.2d 279 (1974).

183. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

dealt with three major arguments against comparative negligence. First, the court responded to the popular "apples and oranges" argument.

We think . . . the conclusion may fairly be drawn that the terms "comparative negligence," "contributory negligence" and "assumption of risk" do not, standing alone, lend themselves to the exact measurements of a micrometer-caliper, or to such precise definition as to divest us from otherwise strong and consistent countervailing policy considerations. Fixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire.<sup>184</sup>

Thus, the *Daly* court rejected the "apples and oranges" argument because it sanctions adhering to formal definitions and categorizations at the expense of the more important goal of "attaining just and equitable result[s]."

Second, the court responded to the argument that comparative negligence principles would undermine the objective of giving a seller incentive to produce safe products:

First, of course, the manufacturer cannot avoid its continuing liability for a defective product even when the plaintiff's own conduct has contributed to his injury. The manufacturer's liability, and therefore its incentive to avoid and correct product defects, remains; its exposure will be lessened only to the extent that the trier finds that the victim's conduct contributed to his injury. Second, as a practical matter a manufacturer, in a particular case, cannot assume that the user of a defective product upon whom an injury is visited will be blameworthy. Doubtless, many users are free of fault, and a defect is at least as likely as not to be exposed by an entirely innocent plaintiff who will obtain full recovery. In such cases the manufacturer's incentive toward safety both in design and production is wholly unaffected.<sup>185</sup>

The court met the third argument, that the triers of fact cannot compare a plaintiff's negligence with a defendant's defective product, by observing that for decades comparative negligence has been available in "unseaworthiness" cases<sup>186</sup> which are also strict liability actions.<sup>187</sup>

Ultimately, the court concluded that fairness and equity mandate that sellers assume liability only to the extent that their products contributed to the user's injuries. Thus, in many jurisdictions, the products liability action in strict tort liability has been construed to include the concept of comparative negligence.

#### D. Comparative Negligence in Warranty Actions

To date, the extension of the comparative negligence doctrine to products liability actions has occurred primarily in the area of the strict liability tort action.<sup>188</sup>

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184. *Id.* at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

185. *Id.* at 737-38, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

186. *See supra* note 167.

187. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 738-39, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978); *see also* Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 656 (1968) (the difficulty of dividing damages is greatly exaggerated because juries have often ignored "the letter of the court's instruction and render[ed] a verdict conforming to their general notions of justice and fair play.").

188. *See supra* notes 176-87 and accompanying text. *But see* West v. Caterpillar Tractor, Inc., 547 F.2d 885 (5th Cir. 1977) (interpreting Florida law, the court stated that comparative negligence applies to both strict tort liability and warranty suits).



As early as 1968, however, at least one commentator had advocated the application of comparative negligence principles to warranty actions.<sup>189</sup> The semantic difficulties that hindered the use of the comparative negligence doctrine in strict liability tort actions, however, are even more pronounced in warranty actions.<sup>190</sup> Warranty, it is argued, is a contract action, and not a tort action. Therefore, the argument concludes that negligence and fault principles are not applicable in warranty cases.<sup>191</sup>

In 1968, Professor Levine anticipated such an argument. He suggested that the characterization of warranty as a tort or contract action is immaterial because both tort and contract actions have a doctrine for apportioning damages.<sup>192</sup> The tort doctrine, of course, is that of comparative negligence. The contract doctrine is more often termed "avoidable consequences."<sup>193</sup> Under this doctrine, courts will not penalize a supplier for damages that the buyer reasonably could have avoided. Accordingly, whether warranty is held to be contractual or tortious should not be determinative of whether or not comparative negligence applies to warranty suits.

As a practical matter though, "[t]he collision of strict liability and comparative negligence is [still considered] one of conflicting theoretical doctrines . . . ."<sup>194</sup> Courts, therefore, may not apply comparative negligence to warranty actions until they conclude that in the area of warranty, as in the area of strict tort liability, "[f]ixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire."<sup>195</sup>

The comparative negligence doctrine should apply to products liability suits that are based on negligence, strict tort liability, or warranty. These theories often overlap and frequently are made separate counts in the same action. Application of the comparative negligence principle to all three actions would not "allow the name that the plaintiff picks for his action [to] control the effect of any possible contributory fault on [the buyer's] part."<sup>196</sup> The Alaska Supreme Court concurred with this reasoning in *Butaud v. Suburban Marine & Sporting Goods, Inc.*<sup>197</sup> In *Butaud*, the plaintiff brought a products liability suit, alleging a defect in the snowmobile that he

189. Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 652-63, 652 n.113 (1968).

190. But note that some states resolve this problem statutorily; see, e.g. Note, Timmerman v. Universal Corrugated Box Machinery Corp.—*An Exception to the Doctrine of Comparative Negligence in Products Liability Litigation: Michigan Courts Speak Out on Public Act 495*, 1981 DET. C.L. REV. 222, 238 n.79.

191. For a statement of this argument, see *Karl v. Bryant Air Conditioning Co.*, 705 F.2d 164, 169 (6th Cir. 1983) (plaintiff argued that "concepts of negligence and fault, as defined by negligence standards, have no place in warranty recovery cases[;] [p]roof of negligence is unnecessary to liability for breach of implied warranty and lack of it is immaterial . . . . [P]laintiff argued further that [there is no warranty to diminish the verdict by the percentage of plaintiff's comparative negligence, because a breach of warranty action is extant and is a contractual, not a negligence, action.").

192. Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 653 (1968).

193. The Restatement (Second) of Contracts states: "Except as otherwise stated in subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation." RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1979); see also U.C.C. § 2-314, comment 13 (1978).

194. Note, Timmerman v. Corrugated Box Machinery Corp.—*An Exception to the Doctrine of Comparative Negligence in Products Liability: Michigan Courts Speak Out on Public Act 495*, 1981 DET. C.L. REV. 222, 238.

195. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978).

196. Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 379 (1978).

197. 555 P.2d 42 (Alaska 1976), modifying 543 P.2d 209 (Alaska 1975).

had bought from the defendant. While the plaintiff was riding the machine at top speed, the drive belt on the snowmobile broke and the pulley guard shattered. The plaintiff claimed that the shattering of the defective pulley guard caused the blindness in his left eye.<sup>198</sup> The defendant raised the plaintiff's contributory negligence as a defense. Although the suit was brought as a strict tort liability action, the court held:

It would be anomalous in a products liability case to have damages mitigated if the plaintiff sues in negligence, but allow him to recover full damages if he sues in strict liability, particularly where the complaint contains alternate counts for recovery in negligence, strict liability, and/or breach of warranty.<sup>199</sup>

The Uniform Comparative Fault Act<sup>200</sup> adopts this same approach. First, this Act attempts to circumvent some of the semantic difficulties in the area of comparative negligence principles by emphasizing the comparison of fault rather than negligence. Second, the Act applies to all products liability suits based on negligence, strict tort liability, or breach of warranty.<sup>201</sup> Thus, the Act suggests that damages in warranty actions, as in strict tort liability actions, should be reduced through the paradigm of comparative fault.<sup>202</sup>

198. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209, 210 (Alaska 1975), *modified by* 555 P.2d 42 (Alaska 1976).

199. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alaska 1976).

200. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35 (Supp. 1984).

201. *Id.* Section 1(a) provides:

In any action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

Section 1(b) provides:

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and contributory fault.

202. The paradigm of comparative fault has also been adopted in legislation currently pending before Congress. *See* S. 44, 98th Cong., 2d Sess. § 9(a) (1984) and H.R. 2729, 98th Cong., 1st Sess. § 9(a) (1983) ("governed by the principles of comparative responsibility"). The bills adopt *pure* comparative responsibility principles, which provide that the claimant's total damages are reduced by an amount proportionate to the amount of harm attributable to the claimant's conduct. *See* S. REP. NO. 476, 98th Cong., 2d Sess. 43 (1984) [hereinafter cited as S.R. 476]. The adoption of a federal standard of comparative fault or responsibility has important and obvious ramifications for the viability and vitality of state law principles governing the doctrine.

Section 3 of S. 44 and H.R. 2729 provides that the federal product liability act supersedes state law to the extent that the bills establish a rule of law for recovery of loss or damage caused by a product. When a rule of law is not established by the bills, the issue is left to applicable state law. *See* S.R. 476 at 22. Congress has the power under the commerce clause of the United States Constitution to enact a federal products liability act that preempts state law; such preemption rests upon the supremacy clause, but the bills do not clearly delineate the scope of that preemption. The intent of Congress determines the scope of preemption, *i.e.*, whether federal legislation totally occupies the field preempting all state legislation, or bars only inconsistent state legislation; where Congress does not specifically indicate its intention, courts determine congressional intention by examining the nature and legislative history of the enactment. *See Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Hines v. Davidowitz*, 312 U.S. 52 (1941). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 292-96 (2d ed. 1983); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-24 to 6-26 (1978). S. 44 creates confusion because it does not clearly state the relationship between federal and state law in a products liability case. *See* S.R. 476 at 74; *Products Liability Act: Hearings on S. 44 Before the Subcomm. on Commerce, Science and Transportation*, 98th Cong., 2d Sess. 243 (1984) [hereinafter cited as *1984 Hearings on S. 44*] (statement of the Honorable Jack Pope, Chief Justice, Supreme Court of Texas, representing the Conference of Chief Justices); *id.* at 106 (statement of Ernest Y. Sevier, Chairman, American Bar Section of Tort and Insurance Practice).

## IV. CONCLUSION

In retrospect, courts have correctly reassessed the seller's responsibility in warranty actions. Today, sellers are held strictly liable for their defective products in both warranty and strict tort liability actions. Courts and commentators, however, have recently begun to conclude that the strict liability of a seller should not obviate the buyer's responsibility for his own safety in strict tort liability actions. Courts have also begun to recognize the importance of buyer misconduct in warranty actions through the doctrine of comparative negligence.

To date, few courts have unequivocally used the doctrine of comparative negligence to reduce a plaintiff's recovery in a products liability warranty action. Judicial reluctance to apply the comparative negligence rule to warranty actions exists chiefly because warranty has been viewed as a contract action to which negligence principles such as comparative negligence do not apply.

One farsighted Connecticut court, however, suggested that the "[i]ssues should not be determined by labels, which serve only to confuse."<sup>203</sup> Indeed, using conclusory labels such as tort action or contract action merely serves to obscure the underlying equities and policies which mandate the application of comparative negligence principles to implied warranty actions. In light of the policies underlying the comparative negligence doctrine, the origin of warranty in tort, and the informal judicial use of comparative negligence principles in warranty actions, jurisdictions should extend the comparative negligence doctrine to the products liability warranty action. Finally, this analysis of the application of the comparative negligence rule to strict liability actions comports with Justice Oliver Wendell Holmes' observation that:

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Furthermore, even if the bills pass Congress and are enacted, the resulting act may not have the limited preemption effect that its drafters intended. The stated purpose of each bill is to eliminate confusion and uncertainty in the current products liability litigation system by adopting a single set of federal standards to replace conflicting and unclear state statutes and court decisions. However, the bills will not produce the desired uniformity in the law. Scholars and jurists have concluded that the bills contain so many novel, vague, and confusing terms and standards that their provisions will only lead to multiple and conflicting interpretations by the courts of the fifty states and the federal jurisdictions. 1984 *Hearings on S. 44* at 378 (statement of Hon. Jack Pope, Chief Justice, Supreme Court of Texas, representing the Conference of Chief Justices); *id.* at 443 (statement of Andrew F. Popper, Professor, American University, Washington College of Law); *id.* at 481 (statement of Aaron D. Twerski, Professor, Hofstra University School of Law); *Product Liability Act: Hearings on S. 44 before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 65 (1983) [hereinafter cited as 1983 *Hearings on S. 44*] (statement of W. Page Keeton, Professor, University of Texas School of Law); *id.* at 158 (statement of Joseph A. Page, Professor, Georgetown University Law Center). The inability of the bills to accomplish their stated purposes was highlighted by testimony before the Senate Subcommittee on the Consumer:

The bill, if enacted, will disturb product law that is already uniform in important respects, and it will destroy the developed common law in the whole range of tort reparations. The bill will disrupt practices and procedures that have been simplified and will require every State to begin again. The bill will require decades of interpretation to unravel new concepts and new definitions in the over-detailed provisions of the bill. 1984 *Hearings on S. 44* at 378 (statement of Hon. Jack Pope, Chief Justice, Supreme Court of Texas, representing the Conference of Chief Justices); *see also* S.R. 476 at 73-75. Thus, the enactment of a federal standard of comparative fault might upset the products liability jurisprudence which has developed within state legal regimes.

As of May 16, 1984, there had been no action on H.R. 2729; S. 44 was considered by the Committee on Commerce, Science and Transportation on March 27, 1984, and ordered reported by a vote of 11 to 5. Letter from Senator Bob Packwood to Mark Caldwell (May 16, 1984) (discussing the status of federal product liability legislation).

203. *Mitchell v. Miller*, 26 Conn. Supp. 142, 150, 214 A.2d 694, 698 (1965); *see also* Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 CASE W. RES. 5 (1965).

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law . . . cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.<sup>204</sup>

With the retention of antiquated labels for legal terms more applicable to the nineteenth century, commercial law has not kept apace with the rapid developments of the modern industrial society. Courts have produced a disjunction between commercial law and the realities of the present day commercial environment.<sup>205</sup>

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204. O. W. HOLMES, *THE COMMON LAW* 5 (Howe ed. 1963).

205. See P. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 21-22, 276-80 (2d ed. 1971).